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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 72.

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL POWER COMMISSION and PHILLIPS PETROLEUM COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

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Dated: August 22, 1962.

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Opinions Below.

The opinion of the Court of Appeals (R. 410-430) is reported at 303 F. 2d 380. The opinion and order of the Federal Power Commission (R. 251-341) are reported at 24 F. P. C. 537, and the Commission's order denying rehearing (R. 395-404) is reported at 24 F. P. C. 1008. The decision of the presiding examiner (R. 35-217) is reported at 24 F. P. C. 590.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 30, 1961 (R. 431-432). The petitions for a writ of certiorari were filed on February 28, 1962 and were granted on May 14, 1962 (R. 432-434; 369 U. S. 870). The jurisdiction of this Court rests on 28 U. S. C. §1254(1) and on Section 19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

Statutes Involved.

Sections 4 and 5(a) of the Natural Gas Act, 52 Stat. 822-823, 15 U. S. C. §§ 717c and 717d(a), provide as follows:

> SECTION 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect)

and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension,

may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with

any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Questions Presented.

1. Whether the Federal Power Commission may indefinitely defer the fixing of just and reasonable rates for sales by natural gas producers while embarking upon a novel, inchoate, and judicially untested method of producer rate regulation that cannot become effective for many years, when such indefinite deferral will cause substantial and irreparable injury to the consuming public.

2. Whether the Federal Power Commission may dismiss rate suspension proceedings and allow a natural gas company to retain rate increases collected between 1955 and 1959, on the basis of a finding that the company's 1954 costs (including a fair return) exceeded its 1954 revenues by 20%, when (a) the company's revenues were known to have increased by more than 50% between 1954 and 1959, and (b) the increased rates were discriminatory on their face.

Statement of Facts.

Under review here is the first (and only) major producer rate case to reach a decision on the merits following this Court's 1954 ruling that the Federal Power Commission has jurisdiction over interstate sales made by natural gas producers. *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672. The proceeding before the Commission involved both (1) an investigation, instituted by the Commission under Section 5 of the Act, into the justness and reasonableness of all of Phillips' interstate rates and (2) several applications by Phillips, under Section 4 of the Act, to increase certain of those rates. Although the case had been tried by all parties on the theory that Phillips' rates should be fixed by reference to its costs, the Commission ultimately held that individual-company cost was not a proper basis for fixing the rates of natural gas producers and terminated the Section 5 investigation. With respect to the Section 4 increases, the Commission found that since Phillips' 1954 jurisdictional costs (including return and taxes) exceeded the company's 1954 jurisdictional revenues by an amount greater than the total of the requested Section 4 increases, those increases—which had been collected by Phillips pending the outcome of the rate case—should be allowed in full. No finding was made that Phillips' costs exceeded its revenues in the post-1954 period during which the increased rates had actually been collected.

The original proceedings, 1948-1954—In October 1948 the Federal Power Commission instituted an investigation (F. P. C. Docket No. G-1148) under Section 5(a) of the Natural Gas Act to determine whether Phillips was a natural gas company and, if so, whether any of its rates were "unjust, unreasonable, unduly discriminatory, or

preferential" (R. 17-20), 7 F. P. C. 983. Following a full-scale field investigation and hearing, the Commission in August 1951 held that Phillips was not a natural gas company and terminated the proceeding, 10 F. P. C. 246. On review, the Court of Appeals for the District of Columbia Circuit reversed, and entered a judgment directing the Commission to "fix the rates at which [Phillips'] sales are made" (R. 405-406). *Wisconsin* v. *Federal Power Commission*, 205 F. 2d 706 at 712 (D. C. Cir. 1953). In June 1954, this Court affirmed the mandate of the Court of Appeals. *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672.

Federal Power Commission action on remand—Upon receiving the Court of Appeals' mandate, the Commission reinstated its Section 5(a) investigation into the lawfulness of Phillips' rates (R. 407-409); later it consolidated with the general investigation twelve specific rate increases which had been filed by Phillips under Section 4(e) between June 1954 and May 1956 (R. 21-23). Hearings in the consolidated proceeding commenced in June 1956. From the outset, the proceeding was recognized as *the* one which would establish a precedent for the Federal Power Commission's rate regulation of natural gas producers, for not only was Phillips the largest producer-seller of natural gas in interstate commerce and the subject of this Court's landmark 1954 opinion, but the Phillips investigation itself was the first of a series of investigations instituted by the Commission into the rates of almost all of the nation's larger producers and was the first to be set for hearing.[1]

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[1] To date, hearings have been concluded with respect to thirteen major producers, accounting for approximately one-third of all interstate sales of natural gas. In four of these proceedings examiners' decisions have been issued, and in five others all briefs have been filed. In each of these cases, as in the Phillips proceeding, complete cost presentations were introduced by the producer, by the staff of the Federal Power Commission, and by one or more interveners. See Appendix A.

Because of its trail-blazing quality, the trial of the Phillips proceeding was a lengthy one, extending over an 18-month period during which hearings were held on 82 days. The hearing record comprised 10,620 pages of transcript and 235 exhibits. At the commencement of the hearing all parties agreed that Phillips' rates should be determined on a cost-of-service basis (R. 60), and four major, full-scale cost-of-service studies were presented—one each by Phillips, by the FPC staff, by four Eastern Seaboard interveners (three of whom are petitioners in No. 74), and by the State and Public Service Commission of Wisconsin (a petitioner herein). Phillips cooperated in making available exhaustive data covering all phases of its natural gas business, including cost-of-service data for 1954, the test year accepted by all parties, and for 1956.[2]

The Examiner's decision—In April 1959, the Presiding Examiner issued an exceedingly comprehensive decision (reprinted, in part, R. 35-217; 24 F. P. C. 590), directed both to the general philosophy of producer rate regulation and to the specific application of that philosophy—on the basis of the instant hearing record—to Phillips Petroleum Company. Under the former heading, the Examiner analyzed the consistent lines of Commission and court opinions which had held that in fixing "just and reasonable" rates for natural gas producers "the conventional rate-base, or cost-of-service, method must be used at least as a point of departure" (R. 57, 59). He noted the persistent contentions made by many producers that the cost-of-service method was "unworkable" and "administratively unfeasible",

[2] The 1956 cost data were presented toward the conclusion of the hearings solely for the purpose of demonstrating that the 1954 data were in fact representative of the future (R. 86 n. 20).

but he accurately observed that these contentions had, up to the point of his decision, been made in a vacuum and not on the basis of any actual endeavor to apply a cost-of-service approach to a major gas producer (R. 58-63). In this connection he pointed out that at no time during the proceeding had Phillips taken the position that the cost-of-service method was unworkable or that it presented unduly complex problems (R. 62). Conceding that the record in the case had been a long one, he explained (R. 65) that

> "the length and complexity of the instant *Phillips* proceeding cannot fairly be regarded as representative of the situation which will be commonly encountered in future producer-rate proceedings, once the Commission has firmly established the applicable standards and methods to be used in determining producer rates. From that point on, the two categories of evidence outlined above [alternative proposals for the handling of various allocation problems, and presentation of general industry-wide data], which consumed so much time in the instant *Phillips* proceeding, will no longer be required."

The Examiner then turned to an examination of the evidence bearing on Phillips' jurisdictional cost of service[3] for the 1954 test year. He concluded that such cost was $57.3 million—equivalent to an average unit cost of 11.7¢ per Mcf (R. 211). He therefore directed Phillips to design and file a schedule of rates which, when applied to sales being made in 1954, would recover that cost of service (R. 214). He further directed that the rates for all sales instituted after 1954 should be adjusted to conform to the sched-

[3] As correctly noted by the court below, "Cost-of-service in this context includes not only operating expenses, taxes, exploration allowances, and gas purchases but also a fair return on the rate base." (R. 413 n. 5).

ule of rates thus derived (R. 215). Pursuant to this direction, Phillips prepared and filed a preliminary schedule of rates (R. 218-225).

The Commission's decision—Exceptions to the Examiner's decision having been filed and oral argument held, the Commission on September 28, 1960 issued its decision here under review. That decision, designated as Opinion No. 338, begins with a discussion (R. 256-269) of the feasibility of regulating independent natural gas producer rates through use of individual company costs and investment. Consistent with the Commission's previously expressed distaste for producer rate regulation,[4] the opinion recites the purported difficulties and unsolved problems which, according to the Commission, were the inevitable result of employing a cost-investment rate base as a starting (or any other) point in regulating natural gas producers. After noting the clogged condition of its dockets, the Commission concluded that it would be neither administratively nor economically sound to utilize individual producer costs to fix producer rates (R. 265).

While rejecting future reliance on individual producer costs, the opinion noted that cost-based regulation was "clearly a lawful way to determine rates for Phillips . . . and under the present record is the only possible method" (R. 269). Finding that the "jurisdictional cost of service for . . . [1956] was not very different from 1954" (R. 272), Respondent adopted the 1954 test year which had been employed by the Examiner and proceeded to find Phillips' jurisdictional cost of service to be $54.5 million[5] (subject

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[4] FPC, 35th Annual Report (1955), 177;
FPC, 37th Annual Report (1957), 17-18, 25;
FPC, 38th Annual Report (1958), 16-17;
FPC, 39th Annual Report (1959), 12-13, 18-19;
FPC, 40th Annual Report (1960), 17.

[5] As revised in the order denying rehearing (R. 401).

to adjustment for certain purchased gas costs, gathering taxes, and royalties) or 11.1¢ per Mcf on jurisdictional sales of 491,178,953 Mcf (R. 404). Jurisdictional revenues for 1954 were $45.6 million (R. 326), resulting in an apparent $8.9 million deficit for that year. (The 1954 revenues do not include, of course, additional revenues experienced in subsequent years (a) from the Section 4(e) increases consolidated with the rate investigation, (b) from *other* Section 4(e) increases, (c) from additional sales volume, and (d) from new sales at higher prices.)

After concluding that Phillips' rates were not excessive in 1954, the Commission inferred, without record support, that they were "probably" not excessive through 1958—by which date it recognized that "very substantial further rate increases were filed by Phillips" (R. 329). Since it also concluded that "there is nothing in the record to show that these past rates . . . are unduly discriminatory or preferential" (R. 326), the Commission terminated all but two of the Section 4(e) proceedings[6] and discharged Phillips from further refund obligation. It thereby approved existing[7] and increased rates made effective during the 1955-1959 period, solely on the basis of its consideration of 1954 costs and revenues.

With regard to the Section 5 investigation, involving Phillips' future rates, the Commission recognized that "the

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[6] The rates called for by the rate schedules involved in Docket Nos. G-10883 and G-11217 are subject to revision on contractual grounds, upon the decision of certain pending pipeline rate cases, and hence these dockets were held open on this limited issue (R. 326-329).

[7] Regularly since 1954, Respondent has authorized all producers, including Phillips, to undertake new sales at initial prices more than double the 1954 average price. Its justification for not scrutinizing the propriety of these prices at the time of initial certification was that it would eventually review them in the Section 5(a) investigations, wherein they could be prospectively lowered. See *Atlantic Refining Co.* v. *Public Service Commission of New York* (Cateo), 360 U. S. 378 (1959).

next step would ordinarily be to alter Phillips' rates . . . prospectively" (R. 323). Nevertheless, and despite the existence of almost a hundred rate increases filed by Phillips during the pendency of the proceeding[8] (R. 324, 329), Respondent terminated without further action the general Section 5(a) rate investigation. This action was justified on two principal grounds: (1) that it would be "a result without reason or justice" to fix Phillips' 1960 rates upon data for an earlier test year (R. 325); and (2) that "the interest of consumers and the exigencies of regulation will be better served in rate proceedings brought on an area basis rather than on an individual company basis" (R. 397).

Statement of General Policy No. 61-1—Concurrently with its opinion herein, Respondent issued a Statement of General Policy No. 61-1 (R. 343-348), 25 Fed. Reg. 9578, containing two lists of area prices—one for initial rates for new sales under Section 7 and another for increased rates (under Section 4(e)) for gas sold under existing contracts —for use "as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended" (R. 343). Respondent expressly represented, however, that the guides were tentative and did not purport to establish "just and reasonable" rate levels for Phillips or any other producer (R. 266, 346). The Policy Statement was issued without notice, hearing, or record, and has been amended several times since, also without notice, hearing, or record. (The levels set forth in Statement of General Policy 61-1 are hereafter referred to as "SGP levels" or "SGP rates.")

[8] As the opinion itself points out, the total annual impact of just five of these increases is approximately $11,000,000 (R. 324 n. 43).

Decision of the court below—On November 30, 1961, the Court of Appeals for the District of Columbia Circuit, Judge Fahy dissenting, sustained the Commission and affirmed its order.

The court analyzed the case by reference to three time periods. The first covered the "locked-in" period, running from February 1955 through July 1959, during which certain of Phillips' rates were subject to refund under the twelve Section 4(e) dockets. The second covered the period of Phillips' "current rates", that is, rates being charged in 1959 and to be charged thereafter until such time as the Commission's proposed area rate making procedures are formulated and placed into effect. The third time period follows completion of the proposed area rate proceedings, at which time rates for the future would be established by reference to the new area standard.

Considering the first time period, the majority held that the Commission had properly allowed Phillips' rate increases to become effective for the 1955-1959 period solely on the basis of its determination of 1954 costs and revenues.

After a brief discussion of the third period, involving Respondent's anticipated treatment of "future" rates in the proposed area proceedings,[9] the court then turned to the middle of the three time periods, that involving "current" rates. The court recognized that the "current" period could last as long as fourteen years and that Respondent is obligated to protect consumers during this period by some form of interim regulation. Although Respondent had proposed to defer regulation of existing rates indefinitely, the majority suggests that the Commis-

[9] Inasmuch as the Commission's plans for area proceedings are, as Judge Fahy noted, "now in an inchoate status" (R. 429), any consideration of the validity of such proceedings would be premature at this time.

sion will be able to use its SGP rates during this period to test the reasonableness of existing rates as well as to test proposed initial rates or to decide whether to suspend and investigate rate increases.[10]

Since the SGP rates, which had been adopted without notice, hearing, record, or specific findings, appear to be based primarily on then-existing field prices (See Appendix B and *infra*, pp. 29-33), the court, as a necessary support for its conclusions, held (1) that the Commission could lawfully base its determination of just and reasonable rates on field price data alone, without reference to the financial requirements of the producers (R. 424-425), and (2) that the SGP temporary rate levels were in fact "just and reasonable" rates which could be used for this purpose, subject only to challenge in individual rate proceedings (R. 424-425).

Finally, after pointing out (R. 426) that "the Commission has found . . . that present rates result in deficits to the Company",[11] the court concluded that the Commission's order was valid and should be affirmed.

Judge Fahy dissented[12] (R. 427-430). He pointed out that Respondent's opinion demonstrated the feasibility of

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[10] The court states (R. 426) that "the new method [i.e., the SGP interim rates] will also apply in 5(a) proceedings to any existing rate found to be unjust or unreasonable." As we shall show, *infra*, p. 33, the court here misconceives the purpose of the SGP interim levels, which were *not* intended by the Commission to be used in determining just and reasonable rates in Section 5(a) proceedings, but only in determining whether to suspend and investigate rate increases under Section 4, and in evaluating the surface propriety of initial rates in proceedings under Section 7.

[11] This is a misstatement, inasmuch as Respondent's finding was based on Phillips' 1954 costs as compared with its 1954 rates, and Respondent expressly refused to require Phillips to submit current cost and revenue figures relating to the "present" period of 1960-61 (R. 396-397).

[12] With partial concurrence on a point not raised by Petitioners herein.

deciding the Phillips' Sections 5(a) and 4(e) cases on the basis of the existing record, supplemented, if deemed necessary, by more recent data; that the majority should not have attempted to settle the validity of the area rate method since that question was not properly before it; that the result of the Commission's action would be to leave Phillips' rates unregulated for the indefinite future, which is entirely inconsistent with the mandate of the Natural Gas Act; that a Commission decision on the record, supplemented as necessary by more recent data, would be far more consistent with the mandate of the Act than the Commission's actual termination of the proceedings, based on the 1954 data; that the Commission could not dispose of the issue as to the justness and reasonableness of the present 1960-1961 rates on the basis of the 1954 data; that a decision in this case would not preclude the Commission from embarking on an area-rate-making program; and that the results of this and other Section 5(a) proceedings presently nearing completion before the Commission could provide assistance to the Commission in establishing guides of the SGP type, pending completion of the area proceedings.

Summary of Argument.

I

The purpose of the Natural Gas Act is, as this Court has frequently held, to underwrite just and reasonable rates to the consumers of natural gas. This statutory purpose is attained primarily through Federal Power Commission enforcement of the rate standards contained in Sections 4 and 5 of the Act: Section 4 declares unlawful any rate that is not just and reasonable, and Section 5

authorizes the Commission to fix just and reasonable rates for natural gas companies subject to its jurisdiction.

In 1954, this Court held that natural gas producers who sold their gas for resale in interstate commerce were, despite their status as producers, natural gas companies subject to Federal Power Commission jurisdiction. Pursuant to that decision, the Commission instituted investigations into the rates of most of the major producers.

In September 1960, after six years of ineffectual regulation which saw the average price of gas sold by producers increase more than 60%, the FPC had before it for decision the first major producer rate investigation, involving Phillips Petroleum Company. Although the proceeding had been tried by the parties and decided by the Examiner on the obvious and commonplace regulatory thesis that just and reasonable rates for Phillips should be fixed by reference to Phillips' costs, the Commission, expressing its belief that a more ideal way of fixing producer rates would be by reference to the financial needs of all producers in a given area, terminated the investigation without disturbing Phillips' existing rates and without passing on the justness and reasonableness of those rates. It took this action even though it knew that its preferred method—which was entirely novel, untried, and untested—could not be made fully effective, as the court below pointed out, for perhaps another fourteen years. It thus effectively suspended the Natural Gas Act's just and reasonable rate standard for an indeterminate period of time; this it had no power to do.

II

Admittedly, the Commission has a broad range of discretion in carrying out its statutory function of protecting

the consumer. But the breadth of that range does not permit it to defer indefinitely effective rate regulation of producers. Having proceeded through hearing and to point of decision in its investigation of the rates of Phillips Petroleum Company—the first of a series of investigations instituted by it into the rates of almost every major producer—the Commission was required to fix just and reasonable rates for Phillips by reference to the comprehensive evidence of Phillips' costs in the record before it, updated if need be. The Commission was not free to terminate this completed investigation—without making a finding on the justness and reasonableness of Phillips' rates—merely because it felt that a more ideal method of regulation would, if undertaken now, be ready for application five or ten years from now. The Commission's decision leaves Phillips free to collect rates which far exceed its costs and which are on their face unduly discriminatory and preferential. The area price "guides", which are to furnish the only semblance of control over producer rates until the area pricing method becomes fully effective many years hence, furnish inadequate consumer protection. In the first place, these guides freeze into permanence the 1959-60 price levels, which were the product of six years of ineffectual regulation. But even if the price guides were based on the rates in effect at the advent of producer regulation—the 1954 levels, which are substantially below those obtaining in 1959-60—they would represent nothing more than a codification of "fair field prices" (i.e., unregulated prices set by existing market forces), which cannot legally be used to fix just and reasonable rates.

Although practical difficulties prevented the FPC from instantaneously fixing just and reasonable rates for Phillips Petroleum Company and other producers upon being advised by this Court in mid-1954 that it had jurisdiction over producer rates, no concept of "deliberate speed" or of

reasonable time to comply with a judicial mandate permits the Commission to defer fixing just and reasonable rates for a period of up to 20 years from the date of mandate. The Commission's duty to hold prices stable *while* it determines just and reasonable rates cannot be substituted, as the Commission now proposes, for its duty *to fix* just and reasonable rates as promptly as possible. The Commission has mistaken its responsibilities; under the impression that its duty is discharged if it simply maintains price stability, it has ignored its primary responsibility to assure the consumer of the lowest reasonable rate.

The Commission further abused its discretion in this proceeding by allowing in full twelve rate increases requested by Phillips for the period 1955-1959 on the basis of a finding that 1954 costs exceeded 1954 revenues. The Commission's own records indicated that Phillips' revenues increased greatly in the post-1954 period, thereby suggesting that the revenue deficiency which may have existed in 1954 was either eliminated or sharply reduced during the 1955-59 period for which the increases were allowed. In addition, although the rates as increased ranged from 5.5¢ to 17.0¢ per Mcf, the Commission refused to make the obvious finding that they were discriminatory and preferential *per se*.

Argument.

Background of these Proceedings.

In 1954 this Court ruled that the Federal Power Commission had, and was required to exercise, regulatory jurisdiction over the rates for interstate sales made by gas producers. In response to that ruling, reached over its strenuous objection, the FPC took the following action:

1. It asked Congress to exempt producers from federal regulation, and when that request was denied, asked that regulatory control of producers be relaxed.[13]

2. It set up certain of the *forms* of regulation—i. e., it required all producers (a) to obtain certificates of public convenience and necessity to continue old sales or to commence new ones; (b) to file each of their gas sales contracts as a rate schedule; and (c) to file each contractual rate increase as a change in rate under Section 4 of the Natural Gas Act, which change, after the statutory five-month suspension period, then became effective, subject to refund at the conclusion of a hearing (seldom instituted) into the justness and reasonableness of the increased rate.

3. It instituted, after a number of false starts and side excursions, investigations on a company-by-company basis into the rates of most of the larger producers.

The Commission's activity under the first head—statutory release from its unwanted task of producer regulation—failed. The activity under the second head was essentially of a record-keeping nature and neither secured nor was intended to secure for the gas consumer his basic right under the Natural Gas Act—the right to pay no more than a just and reasonable rate. Not only did this regulation by record-keeping fail to disclose whether producer prices were just and reasonable at the advent of producer regulation—June 7, 1954—but it served to increase the June 1954 price markedly, both by permitting collection of increase after increase (subject to potential refund, to be sure) and by authorizing new sales at prices sharply higher than the average 1954 price. Thus, between 1954 and 1960 the average price of gas sold in interstate

[13] The Commission's legislative recommendations are cited at note 4, *supra*.

commerce rose from 9.9¢ to 15.6¢ per Mcf and the initial price level for new sales went up even more drastically. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378 (1959).

During this period, the FPC sought to minimize the seriousness of its own delays by pointing to its activity under the third head—the progress of the Section 5 investigations. And it was true that by the fall of 1960 the investigation of Phillips, the largest gas producer, accounting for 10% of the interstate market, was ready for Commission decision, and the investigations of twelve other major producers, accounting for an additional 25% of all sales, were in advanced stages of hearing. Moreover, the ultimate disposition of those proceedings promised to bring to the consumer a substantial measure of relief from the rapid escalation of producer prices, from 6.5¢ in 1950 to 9.9¢ in 1954 to 15.6¢ in 1960. Although the average costs for each producer varied, the data presented by the FPC staff revealed that the costs, including a fair return, ranged generally between 8.5¢ and 13.5¢—well below the 1960 average price of 15.6¢—and in the first case to be decided by an examiner, the instant Phillips case, the costs had been found to average 11.7¢.

It was at this juncture—with immediate and effective producer regulation within its grasp for the first time—that the Commission decided, in its Phillips Opinion and in the concurrently issued Statement of General Policy, that it would not regulate producers on an individual-company-cost basis but would instead pursue an area price method. It was not clear then, and after two years of experimentation with the new method it is not clear now, whether the FPC's new area price method was intended merely to change the *unit* of regulation—from the individual producing company to all producers in a given producing

area—or whether it was intended to change the *basis* of regulation—from fixing rates by reference to the cost of the regulated unit to fixing rates by reference to non-cost data. In its Brief in Opposition to the grant of certiorari, however, the FPC states (pp. 13-14) that the new method will be "based on the reasonable financial requirements of the industry," and will "involve the use of typical or composite cost data." In view of this representation, we shall assume that it is the intent of the FPC, under its new method, to regulate on a cost basis; as we shall show, however, this intent seems to be honored more in the breach than in the observance.

I.

Having proceeded through hearing to point of decision, the FPC was required to fix just and reasonable rates for Phillips by reference to Phillips' costs; it was not free to terminate the completed Section 5 investigation without making a finding on the justness and reasonableness of Phillips' rates merely because it felt that it would be preferable to fix rates for all producers by an alternative method—area pricing—which cannot be made effective for many years.

The FPC's action in terminating the Section 5 investigation without setting just and reasonable rates for Phillips was, we submit, irresponsible and illegal; not only did it throw into discard six years' effort at producer regulation, it did so without providing any reasonable alternative for the foreseeable future. Though not always phrased in the same way, the Commission's excuse for its refusal to fix rates for Phillips on the individual-company-cost record compiled in the Phillips hearing is its belief

that it would be desirable to utilize a different, and in its eyes better, method of regulation—the fixing of uniform rates for all producers in a given producing area by reference to the composite costs of those producers. The Commission and the court below frankly concede that the new method of regulation, which is untried, untested, and wholly inchoate at present, will require anywhere from four to fourteen years to complete. During this time rates will be tested by the area price guides announced by the Commission contemporanegusly with the issuance of its Phillips decision.

In the two years which have elapsed since that decision, the Commission has made abundantly clear that its holding in *Phillips* was general in scope. Since *Phillips* it has failed to decide a single producer rate case, although four such cases have been decided by FPC examiners on the basis of the individual-company costs presented in the hearings; and, while it has permitted (in some instances, directed) those producer rate investigations which were in hearing at the time of *Phillips* to proceed to conclusion and through briefing and examiner's decision, it has not set any new investigation for hearing, even though complete staff field investigations have been concluded as to at least five other major producers.[14]

The FPC has thus withdrawn its staff from the major producer rate investigations; it has substituted very little, however, in place of those investigations. In the two-year period since *Phillips*, it has instituted two area rate investigations—the Permian Basin (AR61-1) and the Southern Louisiana (AR61-2), two areas which account respectively for 12% and 20% of the gas sold in interstate

[14] FPC, *Management Information System*, p. 95 (as of March 31, 1962). The five producers account for 20% of all gas sold in interstate commerce.

commerce. The Permian Basin proceeding is presently in hearing before an FPC examiner—or in roughly the same procedural status as the Phillips proceeding was five years ago; the Southern Louisiana proceeding has not yet been set for hearing—i.e., it is not yet at the stage which the Phillips proceeding had reached more than six years ago.

No final decision can reasonably be expected in the Permian Basin proceeding before 1965 at the very earliest, and decisions in the other area proceedings are likely to be deferred until 1970 and beyond. As a result, the only price protection which the consumer will have during the '60's and into the '70's will come from the Commission's area price "guides", which thus form the basis not for some short-term, interim period of regulation but rather for producer regulation as it is presently administered and as it will be administered in the reasonably foreseeable future.

We turn now to an examination first of the effect of the Commission's decision on Phillips and second of the degree of consumer protection furnished by the area price guides.

A. The FPC's decision leaves Phillips free to collect rates which far exceed its costs.

The evidence of record is clear and for purposes of this appeal undisputed. In 1954, Phillips' jurisdictional costs (including a fair return on investment) were $54.5 million, or 11.1¢ per Mcf on jurisdictional sales of 491 million Mcf. Jurisdictional revenues for 1954 were $45.6 million, resulting in an $8.9 million deficit for that year. Had Phillips' revenues continued at their 1954 level in the succeeding years, there would be considerable justification for the Commission's termination of the Section 5 proceeding (except insofar as Phillips' rates were unduly discriminatory or preferential, a point discussed below). Phillips' revenues did not remain constant in the succeeding years, however,

and the Commission was well aware that they did not. As the figures below, taken from the annual reports filed by Phillips with the FPC, demonstrate, the rise was dramatic:

Phillips Petroleum Company
Jurisdictional Revenues, 1955-1961
(per Annual Reports filed with FPC)[15]

Year	Volumes	Revenues	Average Revenue
1955	512,659,668 Mcf	$45,765,076	8.9¢ per Mcf
1956	491,557,510	46,113,249	9.4
1957	544,753,619	53,725,619	9.9
1958	564,544,294	62,552,009	11.1
1959	602,232,993	74,463,308	12.3
1960	635,854,172	90,859,248	14.3
1961	608,756,938	91,628,487	15.0

The reason for the doubling of total revenues and the more than 50% increase in average unit revenue was well known to the Commission and was in fact the product of Commission action—i.e., over the years the Commission consistently authorized Phillips to undertake new sales at ever higher prices, and it permitted the collection by Phillips, subject in some but not all cases to possible refund, of increased rates for existing sales.

The Presiding Examiner recognized that the real problem in the Phillips situation—and the real injury to the consumer—lay not so much with Phillips' 1954 level of rates (again except insofar as its rates were unduly discriminatory or preferential, see below) but rather with the increased level of rates which had become effective between 1954 and the date of his decision (April 1959) and the increased rates which would thereafter become effective for both new and old sales. Because he found no evidence to

[15] The Commission required no annual report for 1954.

indicate that Phillips' average costs had increased in the period subsequent to 1954,[16] he directed Phillips to file uniform[17] rates (with adjustments made to reflect conditions of delivery) which would, if applied to sales being made in 1954, return Phillips' 1954 costs (R. 214). He further directed that this same schedule of rates be applied to all sales instituted between 1954 and the date of his decision, and to all sales instituted thereafter (R. 215). If Phillips' average costs per unit of sale increased in subsequent years and were not offset by increased revenues, the company would, under the Examiner's decision, be free to file a Section 4 rate increase to recoup such increase in costs (R. 193-196).

In rejecting the Examiner's result—and thereby leaving Phillips free to collect rates in some instances as high as 23.5¢ per Mcf, subject to no refund condition whatsoever—the Commission, as we have noted, relied principally on the thesis that since another method of regulation would be preferable (even though not immediately available), there would be no point in fixing Phillips' rates on the basis of the Company's costs. The Commission also advanced two subsidiary arguments for terminating the Section 5 investigation—first, it said that the test year (1954) was too stale to permit the fixing of rates for 1960 and thereafter; and second, it suggested that it had absolute power under Section 16 of the Natural Gas Act to terminate rate investigations. These subsidiary arguments may be disposed of briefly before turning our attention to what was obviously the Commission's real reason for termination.

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[16] Cost data from a later year (1956) indicated that Phillips' unit costs were remaining constant, see *infra*, p. 26, and note 2, *supra*.

[17] The Examiner concluded (R. 186-187) that uniform rates were necessary in order to eliminate the unreasonable preferences inherent in Phillips' existing rate structure. See *infra*, pp. 39-40.

As to the staleness of the test year, it may be useful to note why 1954 was chosen as the test year by all parties. The staff's investigation had been conducted in large part during 1955 and early 1956, at which time the latest full-year figures available were those for 1954. Hearings actually commenced in June 1956 and continued through December 1957. During the latter part of the hearings, in 1957, Phillips presented data for 1956, the latest full year for which figures were available prior to the conclusion of the hearing. Significantly, these figures were introduced not in an effort to impeach the use of 1954 as a test year but, on the contrary, to demonstrate that the cost experience for 1954 was virtually identical with that for 1956. Because of the length of the hearing and the novelty of the issues, the decisional process was long delayed; fifteen months elapsed between the conclusion of the hearing and the Examiner's decision, and another eighteen months elapsed between the Examiner's decision and the Commission's determination. Thus it was inevitable in this proceeding, and it will be inevitable in each of the Commission's area rate proceedings,[18] that the test year data will be anywhere from three to six years old by the time the Commission is ready for decision. If a three- to six-year-old test year justifies termination of a rate proceeding, then it will be impossible ever to fix rates for the future, and Section 5(a), insofar as it applies to regulation of producers, may as well be written out of the Act.

Petitioners, however, do not urge that the Commission was, in 1960, required to utilize the 1954 test year if it felt that test year was too stale to permit the fixing of future rates. What we do urge is that the remedy for staleness adopted by the Commission—termination of the proceed-

[18] At least until the first such proceeding has been decided on its merits.

ing—is a wholly inappropriate solution to the problem. If the Commission felt that 1954 data were too old, it could easily have reopened the proceeding to receive data of more recent vintage—say 1959. With the standards for determining cost already formulated in the cost-finding sections of the Commission's opinion, such a reopened hearing would have been concerned solely with the application of those standards to the later data. In other words, if, because of the staleness of the test year, the record was not all that the Commission desired, it had ample power to supplement that record and to proceed to decision on the basis of the record as supplemented.

As to the Commission's argument (R. 395-396) that it had, under the catch-all provisions of Section 16, absolute power to terminate any proceeding at any time, the point was apparently a make-weight, and was not urged by Commission counsel in the court below.[19]

We turn now to a discussion of the principal reason for the Commission's termination—its belief that the area price method would, upon ultimate formulation and application, provide a more ideal basis for producer rate regulation than the company-by-company cost approach.

Before proceeding with this discussion, however, we note that this is *not* a case in which an agency held a hearing in an admittedly trail-blazing proceeding to test the comparative value of two competing methods of regulation, chose one over the other, and fixed rates on the basis of the preferred method. Rather, and the difference is crucial, this is a case in which the Commission held hearings upon only a single method of regulation—the indi-

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[19] In March 1961, six months after the FPC's Phillips opinion, the D. C. Circuit reversed an earlier FPC attempt to "terminate" a rate case and thereby allow the increase to remain in effect without reaching a decision on the merits. *Minneapolis Gas Company* v. *F. P. C.*, 294 F. 2d 212 (D. C. Cir. 1961).

vidual-company-cost method which had been consistently applied by it in its regulation of pipelines and which was the usual, if not the exclusive, method of regulation used by other regulatory agencies, both federal and state, under cognate statutes—and then, at the conclusion of the proceeding, *sua sponte*, concluded that an alternative method, which might be ready five or ten years in the future, would be preferable; it therefore declined to fix rates on the basis of the method presented to it. But there was no logical basis for the Commission's action; there was no reason why the Commission could not have proceeded on an individual-company-cost basis until such time as its preferred area-wide method should become effective. Indeed, as Judge Fahy, dissenting below, correctly noted (R. 430):

> "The decision of these cases under the standards of the Act not only would not preclude the Commission from embarking upon the area method, but it also would not preclude the Commission from correcting or modifying the decision should the area proceeding show such correction or modification to be desirable; nor do I think a decision on the present record, supplemented as may be needed, would preclude the Commission, pending conclusion of an area proceeding, from establishing guides, formulated, however, with the aid of a decision in the present proceedings."

Inasmuch as area pricing will not be available until some time in the distant future, there is no occasion here to consider the merits of that method. For present purposes it should be observed, however, that, unlike the older, individual-company-cost approach, area pricing on an industry-wide cost basis is not free from challenge as to its legality. A number of producers have already served notice that if their costs exceed the Commission-determined

industry average, they will insist upon rates geared to *their* costs, and will claim that application to them of rates fixed by reference to the industry standard would constitute confiscation. If these producers are right—something which admittedly can be settled only after the Commission applies its area pricing method and after an appeal is taken—then area pricing will permit a producer to choose between the rate fixed by reference to the industry's average cost and that fixed by reference to its own cost, whichever is higher. Thus the consumer will be deprived of the low rate from the low-cost producer, who will receive a windfall under the new system, while being required to pay the above-average cost of the high-cost producer.

It is primarily the present, however, which concerns us here. For the present and for the foreseeable future the Commission's regulation of producer prices will operate only through use of the price guides established by Statement of General Policy 61-1 (the SGP rates). It becomes appropriate, therefore, to examine more closely into the nature of these guides. Preliminarily, it should be pointed out that the SGP rates sprang, Minerva-like, directly from the Commission's brow, without benefit of those birth-delaying processes—notice, hearing, and record. In consequence, and because they were purportedly to be used only as "guides," the SGP levels *per se* were held nonreviewable. *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (D. C. Cir. 1961).

In deriving the SGP rates, the Commission, as a first step, divided this nation's major producing areas into twenty-three geographic regions on the basis of common pricing patterns.[29] Then for each pricing area the Commis-

[29] Thus, the State of Louisiana was divided into two pricing areas—Northern Louisiana and Southern Louisiana—to reflect the fact that historically prices in one area have tended to move independently of prices in the other.

sion fixed two levels—the initial-service-rate level (sometimes called the new-gas price) and the increased-rate level (the old-gas price). The former, the Commission said, would be used as a guide to evaluate proposed initial sales; where a rate higher than the initial-service rate for the area was proposed, the sale would "be denied a certificate or certificated only upon the condition that lower rates be filed" (R. 346). In the case of a rate increase under Section 4, the Commission stated that it would suspend only where the rate exceeded the increased-rate level.

Notwithstanding the importance of these levels, the Commission was exceedingly vague in stating how they had been derived (R. 345):

> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas."

Neither the Commission's original statement nor any of its pronouncements since have indicated how all of these various factors were weighed or evaluated one as against the other. Did the Commission start, for example, with cost information and adjust upward to reflect trends in production and downward to reflect increased volumes of production? How does one weigh "trends in demand" as against "existing and historical price structures"? And by what algebraic magic may "the available market for the gas" and "trends in exploration and development" be worked into an equation which will produce, with decimal precision,

twenty-three pricing areas and forty-six price levels? The short answer is that the Commission neither explained what it did nor how it could have done what it said it did. The longer, and in all probability the more accurate, answer is that there was one factor and only one factor which dictated the formulation of the area price levels—existing price structures. For the new-gas level, the Commission picked, in essence, the highest permanently certificated rate in the area as of September 1960. See Appendix B.[21] The old-gas levels announced for each area were essentially the average weighted price for all gas sold from the area in interstate commerce in 1959, with the figures rounded off to make a more consistent pattern. Thus the Commission was saying in *Phillips* and in the Policy Statement that it would authorize new sales in the post-1960 period so long as the sale was no higher than the highest price certificated prior to September 1960, and it would permit, without suspension or investigation, Section 4 increases where the increased rate was no higher than the average of all gas sold in the area as of that time.

With his characteristic perception, Dean Landis has pin-pointed both the substantive and the legal defects inherent in this method of area pricing:

> "The recent action of the Commission on September 28, 1960 in promulgating area rates, whether ultimately legal or not, has come far too late to protect the consumer. The area prices there set forth substantially reject the rate base approach and the

[21] Appendix B is identical with Appendix D attached to our Petition for Certiorari. In its Brief in Opposition (p. 17, n. 12) the FPC stated that it "dispute[s] the factual premises" of our argument that the initial-service rate was derived from the highest permanently certificated rate as of September 1960. But this naked assertion was clothed neither with supporting argument nor with a countering factual basis; significantly, the FPC did not dispute the coincidence of initial-service rates with highest previously certificated rates.

> fixed area prices come close to approximately current maximum prices, which have more than doubled in the past five years." Landis, *Report on Regulatory Agencies to the President-Elect*, p. 55 (1960).

As Dean Landis suggests, it would be bad enough had the Commission in setting up area prices merely substituted a field-price standard for the cost or rate base approach. What makes the substitution all the more egregious is that the Commission accepted the 1959-60 field-price levels, even though these levels had increased sharply since 1954 *because of* the Commission's failure to exercise even a minimum of effective producer rate regulation during this crucial period.[22]

Of course, it is accepted law, which we do not understand the Commission to challenge directly, that rate regulation under the Natural Gas Act must be predicated on cost. *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829; *Mississippi River Fuel Corp.* v. *F. P. C.*, 252 F. 2d 619 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 904; *Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (5th Cir. 1958), *cert. denied*, 358 U. S. 804; *Forest Oil Corp.* v. *F. P. C.*, 263 F. 2d 622 (5th Cir. 1959); *Episcopal Theological Seminary* v. *F. P. C.*, 269 F. 2d 228 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 895; *United Gas Improvement* v. *F. P. C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U. S. 823. And we understand the Commission's reasoning in *Phillips* and the Policy Statement, as explained by its Brief in Opposition to the grant of certiorari in this case, to mean no more than that it is shifting from individual-company cost now to industry-wide cost prospectively. Yet under the guise of shifting from one type of cost to another, the Com-

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[22] See Smith, "The Unnatural Problems of Natural Gas," Fortune Magazine, Sept. 1959, p. 120.

mission has, for the present and foreseeable future, abandoned all meaningful regulation and substituted in its place a variant of the notorious and totally discredited fair-field-price method. Indeed, the field-price system established by the area price guides is far more vicious than earlier field-price systems that have been disapproved by the courts. Thus, in *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829, the field-price standard there urged and rejected as not constituting a valid regulatory method was directly comparable to the old-gas price (without, of course, the inflationary effect of six years of do-nothing Commission regulation). Under the Commission's present system, however, producers would not only have the benefit of the old-gas level to govern the price of gas explored for, discovered, and dedicated to the interstate market five and ten and twenty years ago, but would be entitled to a new-gas price up to 50% in excess of the old-gas level for additional dedications to the interstate market.

It is true that the Commission has stated that the SGP levels are intended merely as guides to Commission action in issuing certificates and in determining whether to suspend proposed rate increases; indeed, the Commission itself has stressed that the price guides are not intended to fix just and reasonable rates.[23] But despite these protesta-

[23] In the original Statement of General Policy, the Commission expressly stated (R. 346) that the SGP levels would not "fix the ultimate justness and reasonableness of any rate level," and this sentiment has frequently been repeated since. Thus, for example, in a formal opinion issued six weeks after the decision of the court below, the Commission stated:

> "The area price levels, as set forth in the Policy Statement and its amendments, are 'for the purpose of guidance and initial action by the Commission,' and do not constitute determinations of just and reasonable prices." *Panhandle Eastern Pipe Line Co.*, Op. No. 350 (January 15, 1962) Mimeo., p. 9.

tions, the Commission has in fact utilized the price guides for the comparable purpose of settling producer rate investigations which have proceeded through the hearing and initial decision process on a cost basis. Thus, for example, in the Tidewater Oil Company rate investigation, G-13310 et al, decided September 14, 1961 by the same examiner who decided the instant Phillips investigation, the Commission, rather than decide the case, extended the time for filing exceptions from the twenty days required by its rules to nine months and sixteen days in order that a settlement might be negotiated. The basis for settlement ultimately accepted by the parties was in no way related to the cost as determined by the examiner or as urged by any party to the proceeding; rather it corresponded to the fair-field-price level enshrined in the Commission's Policy Statement. Faced, however, with a Commission refusal to decide the case on its merits—and so long as the case remained unsettled Tidewater continued to collect increasingly higher rates, some but not all of which were subject to refund—the interveners finally agreed to a settlement. Commission approval followed on June 15, 1962.[24]

A comparison of the results of the settlement, based on a fair-field-price theory, with the indicated results of the examiner's decision, predicated on cost plus fair return, is instructive. Under the examiner's decision, Tidewater's costs were 11.5¢ per Mcf and its average revenue would, of course, be the same; under the settlement, Tidewater's average revenues will be 15.9¢ per Mcf (at the time of settlement, Tidewater's rates averaged approximately 17.5¢ per Mcf). Under the examiner's decision, all of Tidewater's requests for rate increases would have been disallowed; under the settlement, Tide-

[24] *Tidewater Oil Co.*, G-13310 et al., Order Conditionally Approving General Rate Settlement Proposal (June 15, 1962).

water will be permitted to retain approximately $2.2 million of the $3.3 million annual increase it had sought. Under the examiner's decision, Tidewater would have been required to refund approximately $10 million in unjustified rate increases collected subject to refund; under the settlement, Tidewater will be required to refund only $4 million.

The Tidewater settlement set the pattern of the day—i.e., examiners determine cost of service; the Commission does not decide; in order to end the matter and attain some stability in gas costs (and relief from high Section 4(e) rates) interveners join in or condone settlements based on the interim area price levels,[25] which are nothing more nor less than fair field prices.

But, as noted above, the courts have repeatedly and consistently held that fair-field-price regulation is not meaningful regulation and certainly not the type of regulation contemplated by the Natural Gas Act. We do not believe the point requires extended discussion here; suffice it to say that fair-field-price regulation is not regulation at all, it is merely ratification of the market price.[26]

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[25] See *Ohio Oil Co.*, RI60-92 et al., Order Approving General Rate Settlement Proposal (June 28, 1962), where the Commission stated:

> ". . . the Commission approves of and wants to encourage settlements which dispose of most of a producer's pending rate problems, *which do so in accord with our area rate ceilings*, which provide for a reasonable moratorium on increased rate filings, which require refunds where appropriate, which lend certainty to the purchased gas costs of buyers, and which free the producer's revenues from contingencies that inhibit exploratory and developmental activities." Mimeo., pp. 3-4. (Emphasis added; footnote omitted.)

To the same effect, see *Shell Oil Co.*, G-9446 et al., Order Conditionally Approving General Rate Settlement Proposal (Aug. 1, 1962).

[26] This thought was succinctly expressed by the Fifth Circuit just a year ago:

> "As we have previously stated in Bel Oil Corp. v. F. P. C., 5 Cir., 255 F. 2d 548, 553, a price paid for gas as the

In addition, we do not understand the Commission, despite its present enthusiasm for such fair-field-price producer rate settlements, to contend that fair field price is a valid method of regulation. The most we understand the Commission to say is that industry-wide cost should be substituted for individual-company cost. Our complaint here is precisely the lack of any logical connection between the Commission's claim that industry-wide cost is the best method and its actual use for the present and foreseeable future of the fair-field-price method of regulation. Indeed, since the Commission appears to recognize that a cost method is required by the Gas Act, is workable under the Gas Act, and is desirable under the Gas Act, we are at a loss to understand why the Commission refuses to utilize the only cost method presently available—individual-company cost—while its ideal method is being worked out.

B. The FPC's decision deprives the consumer of his right to pay no more than a just and reasonable rate.

Upon being told by this Court in 1954 that producers selling natural gas for resale in interstate commerce were subject to regulation under the Natural Gas Act, the Com-

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result of arm's length bargaining with the producer is not, merely because bargained for in a highly competitive market, 'just and reasonable' within the intendment of the Natural Gas Act, 15 U. S. C. A. §717 *et seq.* See also New York Public Service Comm. v. F. P. C., D. C. Cir., 287 F. 2d 143. This is so because the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public. 'The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.' Atlantic Refining Co. v. P. S. C., 360 U. S. 378, 388." *United Gas Improvement* v. *F. P. C.*, 290 F. 2d 133 at 135 (5th Cir. 1961).

mission's responsibilities fell into two major categories: First, it was obliged to fix, as rapidly as possible, the just and reasonable rate for producer sales—a task then 16 years overdue. Second, since it was evident that the ultimate fixing of producer rates would take some time, the Commission was under an obligation to maintain control over price levels until it could, by completing its first task, determine whether adjustments were necessary. Unfortunately, during the period 1954-60, respondent neither stabilized the price level pending ultimate conclusion of the rate proceedings—in this period the average price of gas sold by producers to interstate pipelines advanced from 9.9¢ to 15.6¢ per Mcf[27]—nor did it move with any element of speed in its rate-fixing proceedings. The Commission now proposes, in *Phillips* and in its Policy Statement, to drag out for another five or ten years the finding of just and reasonable rates; any stability in prices accomplished in the interim will be at or near the 1959-60 levels.[28]

It is thus obvious that the Commission has completely mistaken its function as a regulatory agency. The Commission is *not* intended, in the manner of a wage stabilization board or an office of price administration, merely to stabilize

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[27] The 1954 level of 9.9¢ represented an all-time high, and compares with a range of 4.5¢-6.5¢ between 1938 and 1950.

[28] It should be noted that the Commission's decision to stabilize came only after its more egregious failures to do so were reversed twice by this Court and six times by courts of appeals. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U. S. 378 (1959); *Public Service Commission of New York v. F. P. C.*, 361 U. S. 195 (1959); *United Gas Improvement v. F. P. C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U. S. 879, 881; *Public Service Commission of New York v. F. P. C.*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied*, 365 U. S. 880, 882; *Public Service Commission of New York v. F. P. C.*, 287 F. 2d 143 (D. C. Cir. 1960); *United Gas Improvement v. F. P. C.*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement v. F. P. C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U. S. 823; *United Gas Improvement v. F. P. C.*, 290 F. 2d 147 (5th Cir. 1961), *cert denied*, 366 U. S. 965.

prices or to prevent further price rises. Rather the Natural Gas Act imposes upon the Commission the affirmative duty of fixing just and reasonable rates for all gas sold in interstate commerce. While concededly the Commission must be permitted an appropriate length of time within which to carry out this affirmative function, a period of 10 to 20 years from the date of this Court's 1954 decision is patently unreasonable by any standards. It is made even more unreasonable by the present availability of tools—the individual-company rate
used to fix just and reasonable r...
after all, a practical ventu...e, not an ac...
determine the most ideal methodology regardless ...
sequences.

C. The FPC's decision leaves Phillips free to charge rates which are on their face unduly discriminatory and preferential.

In our argument thus far we have directed ourselves to the contention that the Commission's decision of September 28, 1960 is erroneous because it leaves Phillips free to collect rates which are unjust and unreasonable in that they generate, both on an over-all and on an average unit basis, a level of revenues in excess of those required by Phillips' costs as demonstrated on the record before the Commission. We turn in this section to our second contention, that the Commission's order terminating the proceedings would be erroneous, even if Phillips' rates produced no greater revenues than its costs, in that the decision leaves standing a patchwork of inconsistent rates, ranging from a low of 1¢ per Mcf to a high of 23.5¢ per Mcf, which are on their face unduly discriminatory and preferential, in violation of Sections 4(a), 4(b), and 5(a) of the Natural Gas Act.

Section 4(a) declares unlawful any rate "that is not just and reasonable". Section 4(b) provides that no natural

gas company shall "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates . . . either as between localities or as between classes of service." Section 5(a) provides that whenever the Commission "shall find that any rate" charged by a natural gas company "is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate

term contracts usually of 20-year duration to interstate pipelines on the basis of the best bargain it could get. The price varied from contract to contract depending on such factors as the need of the pipeline for the particular gas, the need of Phillips to dispose of the gas promptly, the level of the other prices being negotiated by buyers and sellers in adjacent fields, and similar factors which determine price in a freely competitive market but which are entitled to little if any consideration in the regulatory sphere.

The question of proper rate design was discussed at length by the Presiding Examiner in his decision (R. 160-196). He noted (R. 178) that Phillips' rate structure on June 7, 1954—the date of this Court's Phillips decision and the date used by the FPC to mark the advent of producer rate regulation—included prices which ranged from a low of 1.2¢ to a high of 15.7¢ per Mcf, and he held that any attempt to continue such a structure would preserve for Phillips "an unduly discriminatory rate structure which would be contrary to the public interest". He also

noted with approval the contention made by the Commission staff that "Phillips' contract rates vary so widely, even as between contracts for the same service from the same producing areas, as to patently contravene the public interest, generating and perpetuating undue preference and undue discrimination" (R. 178-179). He therefore concluded that a uniform rate should be adopted, with adjustments only for differing conditions of delivery (i. e., fixed differentials for point of delivery, pressure, dehydration, and impurities). In support of his conclusion, the Examiner specifically found (R. 187):

> "[It (the uniform rate) would eliminate unreasonable preferences currently enjoyed by pipelines which are still purchasing gas under old, abnormally low-priced contracts—preferences which are based not merely upon differences in cost levels, but which reflect other historic reasons."

Although agreeing with the Examiner that Phillips' average unit cost was in the 11-12¢ range, the Commission, in a brief conclusory discussion, cavalierly brushed aside the Examiner's finding of undue discrimination and preference. Speaking of the Section 5(a) proceeding, the Commission stated "there is nothing to show that Phillips' contracts relating to Phillips' diverse conditions of sale are unduly discriminatory or preferential" (R. 325). Though conceding that there was "considerable diversity among the rates," the Commission in discussing the Section 4(e) aspect of the case again repeated its conclusory statement that "there is nothing in the record to show that these past rates reflecting the different conditions of sale are unduly discriminatory or preferential" (R. 326). On rehearing, Wisconsin pointed out that a number of Section 4 increases were to levels well in excess of the average unit cost of ser-

vice; in denying rehearing the Commission stated, "The fact that some of these rates are in excess of the average cost of service determined by us is immaterial", and again repeated its statement that there was "nothing to show that these rates are discriminatory or preferential" (R. 397).

Surely, it is difficult to imagine a situation more unduly discriminatory and preferential than a rate structure which varies from 1.2¢ to 15.7¢ per Mcf[29] without even a claim that the differences in price are related to differences in cost. It is also difficult to imagine how, under the Commission's approach, a finding of undue discrimination and preference could ever be made.

A recent examiner's decision lays bare the discriminatory, and hence illegal, nature of price differentials of precisely the type involved here:

> "It is fundamental that all customers of the same class within an area, who receive from a producer the same kind of service under the same or similar conditions, must pay the same rate. The uniform rate thus automatically becomes the proper rate. As the Commission had occasion to state in affirming the Examiner in *Willmut Gas & Oil Co., et al.* v. *United Gas Pipe Line Co.*, Docket No. G-1158, 12 FPC 132, 145:
>
> > 'An unreasonable difference in rates under substantially similar conditions of service constitutes unjust discrimination. *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92. United concedes that, under this definition, unjust discrimination exists if Willmut is required to pay a higher price for gas under like conditions of service. The premise upon which the right to the same price stands is, as the Supreme Court said, "like conditions of ser-

[29] By 1960, certain of Phillips' rates were as high as 23.5¢ per Mcf.

vice." These conditions have been shown. And since "all individuals have equal rights both in respect to service and charges", which was also said in the *Western Union* case, the logical consequence is that Willmut is entitled to the same rate as MVG, as the examiner properly found. For United to charge one customer approximately 50 percent more for gas delivered under substantially similar conditions is to require such customer to pay an unreasonable and unduly discriminatory rate.'

* * * * * * *

"The charging of different rates for the same class of service rendered under the same or similar conditions clearly enables producers to circumvent the statutory scheme of regulation with the result that 'the basic purpose of the * * * Act fails of realization' (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789).

"In the Examiner's view, if the Commission is to carry out the intent of the Act to protect consumers and keep its difficulties relating to producer rate regulation from snowballing, it must in every rate case such as this do what it has directed be done here, namely, fix uniform rates for the future. This makes the Commission the master of the tools it has fashioned rather than being mastered by them. There can be no question but that if the Commission had failed to fix uniform rates for pipelines for the future in the same manner that it failed to fix *Phillips'* rates for the future, the Commission would today be in somewhat the same position with respect to pipeline rates that it finds itself in with respect to producer rates. The failure in a producer rate case to fix uniform rates for the future, and thereafter cause subsequently filed rates to conform to the uniform area rate, is an open invitation to producers to continue to attempt to exact still higher, unjust, unreasonable, discriminatory and preferential rates, and places the burden on the Commission, which

is endeavoring to shorten its hearing processes, to expand certificate hearings to receive evidence as to the condition that should be included with reference to the level of the rates involved therein." *Amerada Petroleum Co.*, G-9385 et al, Examiner's Decision (April 9, 1962) Mimeo., pp. 70-72.

II.

The FPC abused its discretion in allowing the Section 4 increases for the period 1955-1959 on the basis of a finding that 1954 costs exceeded 1954 revenues.

In view of the undisputed facts of record in this proceeding, the Commission's termination of the Section 4 dockets is wholly unjustifiable. Before describing the nature and history of these dockets, however, we note that the Commission's termination of the Section 4(e) suspension dockets is the equivalent of allowing the increases in full.

When a proposed rate increase is filed with the Commission under Section 4(d), the Commission has power under Section 4(e) to institute a hearing into the propriety of the increase and to suspend its operation for a period of five months. Assuming what is usually the case, that the Commission does not conclude its hearing within the five-month period, the increase becomes effective, subject to refund of any portion later found unjustified.[30] If the Commission thereafter terminates the Section 4(e) proceeding and, as

[30] It frequently happens, and indeed it was the situation here, that before the Commission can conclude its hearing on the propriety of an increase, a second and even a third and a fourth increase for the same sale has been filed, suspended, and collected subject to refund. The span of effectiveness of an increase thus superseded is customarily referred to as the "locked-in" period.

part of the termination, discharges the natural gas company from its obligation to refund excessive amounts, it thereby approves in full the requested rate increase.

In the instant proceeding, the twelve Section 4 increases allowed by the Commission were filed by Phillips between June 1954 and May 1956; the filings were not predicated on any increase in costs to Phillips but simply reflected increases to which Phillips was entitled under its contracts with various of its purchasers. The increased rates ranged from 5.5¢ (G-3175) to 17.0¢ per Mcf (G-4333). Each increase was suspended by the Commission; each became effective at the end of the five-month suspension period; and each remained in effect until it was in turn superseded by a later filing. The twelve increases became effective on various dates in 1955 and 1956, and were superseded in 1959 and 1960. At the time the increases were filed, Phillips estimated that they would generate additional revenues of approximately $5.3 million annually.

The Commission and the Presiding Examiner were in basic agreement that in 1954 Phillips' revenues were approximately $46 million, or roughly 9¢ per Mcf on the average, and that its costs were $55 million, or roughly 11¢ per Mcf. Because of the way in which the Examiner disposed of the case, the particular level of Phillips' 1954 revenues made little difference; the Examiner provided that Phillips' rates for the period 1954 to the present and continuing into the future should be fixed on a uniform basis by reference to Phillips' 1954 average cost of 11¢.

The Commission, however, held that because Phillips had a revenue deficiency of $9 million in 1954, a $5.3 million increase in its 1954 revenues would not have resulted in excessive revenues; from this correct holding, it proceeded to the erroneous conclusion that the Section 4 proceedings

should be terminated. This conclusion is erroneous because it permits Phillips to retain the $5.3 million increase for each year during the period 1955-1959. If we could assume that Phillips' revenues remained constant during the 1954-1959 period, then the Commission's treatment insofar as it related to level of revenue would be eminently correct. But in point of fact, Phillips' revenues did not remain constant; as the result of additional sales volumes, increased rates for old sales, and new sales at higher prices, revenues virtually doubled. See p. 24, *supra.*

If the Commission wished to decide the Section 4(e) dockets on a revenue deficiency basis, it was incumbent on it to determine whether there was *in fact* a deficiency each year during the period in which the increases were collected, see *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133 at 161-2 (1930), or else to assure itself that the revenue received by Phillips in 1954 was typical of the revenue received in the later period. Although Phillips may have incurred an actual loss in 1954, that past loss cannot be recouped in setting rates for subsequent years. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287 (1933); *Georgia R. & Power Co.* v. *Railroad Commission*, 262 U. S. 625 (1923); *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388 (1922); see also *F. P. C.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942).

Even if Phillips' increases had been properly justified on a revenue deficiency basis, however, allowance of these increases would have been improper because of their patently discriminatory nature. The pattern of differentials previously noted in Phillips' rates at the advent of regulation (R. 178) was mirrored in the pattern of increases sought by Phillips in this proceeding; in its application seeking rehearing, Wisconsin pointed out (R. 360) that seven of the twelve rate increase dockets involved increased rates

in excess of the 11.1¢ Commission-determined cost of service. The Commission nevertheless refused to find that this pattern of rate differentials constituted undue discrimination or preference. By authorizing such wildly disparate *increased* rates, the Commission only compounded its error in failing to eliminate the unjustified differentials in *existing* rates, again in violation of the anti-discrimination provisions of the Act. See Point I. C., *supra*, pp. 38-43.

In the final analysis, what the Commission did here was to jettison the Section 4(e) investigation on the basis of 1954 test year data, thereby permitting the continued collection of rates which have never been adequately tested, either as to level or to form, under the standards of Sections 4 and 5 of the Act. The error of such action was accurately described by Judge Fahy in his dissent below (R. 430):

> "The finding of the Commission in the section 4(e) proceedings that there could be no refunds because the cost of service exceeded the revenues on the basis of the data for the 1954 test year, I think does not justify the order terminating all but two of the section 4(e) proceedings, or the Commission's invitation to Phillips to move to terminate all others which are still pending. *The absence of a decision on the issue of justness and reasonableness of rates has the effect of leaving all rates subsequent to 1954 untested under the standards of the Act. Substance is not achieved merely by finding whether or not refunds were due on the basis of the 1954 data.* A finding in that regard should not be independent of a finding of the just and reasonable rates. The former should follow from the fact that the just and reasonable rates are not exceeded by those in effect." (Emphasis added.)

Conclusion.

Petitioners respectfully request that this Court vacate the judgment of the Court of Appeals and remand the case to that court with directions to remand the case to the Federal Power Commission for the purpose of fixing just and reasonable rates *now* for Phillips Petroleum Company on the basis of its costs.

Dated: August 22, 1962.

Respectfully submitted,

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APPENDIX A.

Comparison of Average Unit Costs with Average Unit Revenues for All Major Producers whose FPC Rate Cases Have Progressed to Briefing or Decision.

Rank[1]	Producer	Docket	Average Cost[2]	Test Year	Average Revenue per Mcf[3]			Per Cent Increase	1960 Revenue[4]	
					1954	1957	1960	1957-60	Total	Percent Collected Subject to Refund
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
	Decided by Commission									
1	Phillips Petroleum Co.	G-1148	11.1¢	1954	8.9¢	10.3¢	14.3¢	38.8%	$90,859,248	22.7%
	Decided by Examiners									
10	Union Producing Co.	G-18354	8.7¢	1958	7.1¢	9.8¢	12.8¢	30.6%	$17,840,692	9.2%
17	Tidewater Oil Co.	G-13310	11.4¢	1957	10.0¢	14.1¢	18.2¢	29.1%	$17,903,668	16.4%
33	Amerada Petroleum Corp.	G-18634	12.2¢	1957	9.2¢	11.7¢	13.5¢	15.4%	$ 5,300,016	7.9%
56	Hunt Oil Co.	G-10414	17.3¢	1957	11.5¢	16.5¢	18.4¢	11.5%	$ 4,736,170	22.7%
	Hearing Concluded (Cost per FPC Staff)									
4	Gulf Oil Corp.[5]	G-17813	9.4¢[6]	1957	9.6¢	11.5¢	15.4¢	33.9%	$29,028,130	16.3%
5	Shell Oil Co.	RI60-111	14.8¢[6]	1959	10.3¢	11.9¢	18.9¢	58.8%	$55,434,867	21.3%
6	Texaco, Inc.	G-8969	8.5¢	1956	10.8¢	15.3¢	17.8¢	16.3%	$31,835,212	9.1%
7	Cities Service[7]	G-12780	8.3¢	1957	10.5¢	11.5¢	13.7¢	19.1%	$22,446,252	9.4%
12	Sun Oil Co.	G-18353	12.3¢	1957	8.6¢	12.0¢	16.0¢	33.3%	$17,524,295	11.3%
15	Continental Oil Co.	G-16966	11.0¢	1955	8.9¢	10.8¢	17.9¢	65.7%	$13,000,859	4.3%
23	Ohio Oil Co.	RI60-92	12.0¢	1958	9.2¢	11.6¢	13.6¢	17.2%	$ 9,797,875	7.6%
60	Sohio Oil Co.	G-18355	15.2¢	1958	9.0¢	9.7¢	19.0¢	95.9%	$ 4,749,664	54.3%
	Weighted Averages		10.9¢[8]		9.2¢	11.5¢	15.7¢	36.5%		16.9%

[1] Rank includes sales made by affiliated companies.

[2] Except for Texaco and Continental, cost figures were derived using methods employed by FPC in its Phillips Opinion.

[3] Cost and revenue figures are not directly comparable, but are included to show approximate order of magnitude.

[4] Excludes revenues from sales made under other producers' rate schedules.

[5] Excludes Warren Petroleum Corp.

[6] Production taxes estimated.

[7] Includes Cities Service Oil Co. and Cities Service Production Co.

[8] Figure is approximate since underlying volume data for each producer are not precisely comparable.

Sources: (1) F. P. C., *Direct Sales by Producers of Natural Gas to Interstate Natural Gas Companies*, 1960.
(2) (3) (4) F. P. C. records.
(5) (6) (7) F. P. C., *Direct Sales by Producers of Natural Gas to Interstate Natural Gas Companies*, 1954, 1957, and 1960.
(9) (10) F. P. C., Form 301A for year ended Dec. 31, 1960.

APPENDIX B

Comparison of FPC Area Price Levels Set Forth in SGP61-1 with Highest Accepted Rate on File with FPC as of September 19, 1960, for Permanently Certificated Sale.

FPC Pricing Area	SGP61-1 Price Level for New Gas	Highest Permanently Certificated Rate as of Sept. 1960*	Comment or Explanation
Texas Dist. 1	15.0¢	14.5¢	
" " 2	18.0	18.0	
" " 3	18.0	20.0	See Note 1
" " 4	18.0	18.0	
" " 5	14.0	—	
" " 6	15.0	14.5	
" " 7B	14.0	10.5	See Note 2
" " 7C	16.0	16.0	
" " 8	16.0	16.0	See Note 3
" " 9	14.0	14.0	
" " 10	17.0	17.0	
So. Louisiana	21.5	22.0	See Note 4
No. Louisiana	17.0	18.5	See Notes 4, 5
Mississippi	21.5	21.5	
Okla.—Panhandle	17.0	17.0	
" —Carter-Knox	16.8	16.8	
" —Other	15.0	15.5	
Kansas	16.0	16.0	
N. M.—Permian	16.0	16.0	See Note 3
" —San Juan	12.7	12.7	See Note 6
Colorado	14.6	16.0	See Note 7
Wyoming	15.0	15.0	

* Excludes rates authorized under temporary authority and rates for sales to commence more than three years in future.

Source: Adapted from F. P. C. Staff Exhibit No. 9 in *Ohio Oil Co.*, G-15385, as expanded and annotated from F. P. C. records.

NOTES

1. Prior to the announcement of the SGP levels in September 1960, the FPC had breached the 18¢ level in District 3 only twice—in *Peoples Gulf Coast*, G-19086, and in *Trunkline*, G-15394. In both instances, certification came after the Public Service Commission of New York had been excluded. New York's exclusion from

Peoples Gulf was subsequently reversed, 295 F. 2d 140 (D. C. Cir. 1961), thereby vacating the 20¢ certification in that case. Although New York's appeal from its *Trunkline* exclusion was dismissed as not timely filed, 284 F. 2d 200 (D. C. Cir. 1960), because of the circumstances surrounding New York's exclusion, the FPC does not regard the Trunkline levels as precedents. See Brief for FPC, pp. 11-18, filed February 12, 1962, in *Hunt et al* v. *F. P. C.*, 5th Cir. No. 19065 et al.

2. District 7B appears to be the only area where the SGP level (14.0¢) departs significantly from the prior high to 1960 (10.5¢). By way of possible explanation, we note the following: (1) by 1960, the 10.5¢ level was quite old, having been established many years previously; (2) very few new sales had been undertaken from District 7B in recent years; and (3) the SGP level for the two neighboring Districts, 7C and 8, is 16.0¢.

3. As of September 1960, the highest permanently certificated *wellhead* price for the Permian Basin of New Mexico and Texas District 8, which adjoins it, was 16.0¢ per Mcf. In August 1959, the FPC had authorized the sale of gasoline plant *residue gas* at 18.0¢ per Mcf, *Transwestern Pipeline Company*, 22 F. P. C. 391; the Transwestern opinion specifically notes that 16.0¢ was the highest wellhead price in the area.

4. The Louisiana prices are shown exclusive of tax reimbursement since this is the way in which they are shown by the FPC's Statement of General Policy. The Southern Louisiana price was modified slightly after the issuance of several Court of Appeals decisions reversing certifications at the level originally stated.

5. The only North Louisiana price in excess of 17.0¢—a single sale by Gulf Oil at 18.5¢—was apparently certificated in error; see Examiner's Decision in *Ohio Oil Co.*, G-15385 (November 8, 1961) Mimeo., pp. 19-21.

6. In addition, the FPC had certificated a 15.9¢ sale in the San Juan Area for *gathered* gas; this price includes a gathering charge of at least 4.4¢. Southern Union Gathering Company Rate Schedule No. 1; see *Southern Union Gathering Company*, G-7670, 14 F. P. C. 1220.

7. Includes 1¢ pressure adjustment. Moran Brothers, Inc., Rate Schedule No. 2.